1. Rule 102: Duties of parties.

Staff added a definition of "party".

> ***a. Parties in a lawsuit.*** Everyone who is named in a lawsuit is a "party". References in these rules to a party include one party as well as many parties. When these rules refer to a party, it includes the party's attorney if the party has an attorney.

2. Rule 102 + Rule 145: Duty to conclude a lawsuit within ten months

These rules presently provide as follows:

> ***102e. Duties of plaintiffs to conclude a lawsuit within ten months.*** A final judgment shall be entered within ten months from the date a lawsuit is filed, or the plaintiff shall file a written motion to extend the time for entry of judgment to a particular date. If the preceding requirement has not been met, the clerk shall mail a notice to the parties informing them that unless the requirement is met within two months from the date of mailing, the court will dismiss the lawsuit for failure of the plaintiff to have judgment timely entered. If the requirement has not been met within two months from the mailing of the clerk's notice, the court may dismiss the lawsuit without further notice to the parties.
>
> ***145f. Dismissal for failure to conclude a lawsuit within ten months.*** If a final judgment has not been entered within **ten months** from the date a lawsuit is filed, or if the plaintiff has not filed a written motion to extend the time for entry of judgment to a particular date, as required by Rule 102(e), the clerk shall mail a notice to the parties informing them that unless the requirement is met within two months from the date of mailing, the court will dismiss the lawsuit for failure of the plaintiff to have judgment timely entered. If the requirement has not been met within two months from the mailing of the clerk's notice, the court may dismiss the lawsuit without further notice to the parties.

The substance of these rules was proposed by Judge Hegyi. Ms. Blanco suggested deleting the rules. Comment from Mr. Rosenbaum: I agree with the deletion. This concept needs work. Shouldn't we say something to the effect that a case may be dismissed on 30 days' notice by the clerk if, before X months after filing, the plaintiff has not requested that matter be set for trial? The plaintiff cannot be penalized for court delays.

3. Rule 103: Conduct during a lawsuit

In paragraph (c), "agreements between parties", staff substituted the words "written records" for the word "minutes."

4. Rule 112: Claims for relief; remedies

Staff moved the last sentence of paragraph (a) to paragraph (b). The sentence states: "Claims based on separate transactions or occurrences shall be stated separately so that the basis of each claim is clearly presented."

5. Rule 114: Issuance of a summons, etc.

The following paragraph (c) was added by staff as a result of previous Committee discussions:

> ***c. Notice to defendant.*** Before service of the summons and complaint, plaintiff shall attach to each summons a "notice to defendant" substantially in the form included as Form 1 in Rule 149. The court shall not grant a default judgment against a defendant unless the affidavit of service, affidavit of publication, or other proof of service establishes that the notice to defendant was served upon the defendant with the summons and complaint.

See also Rule 149, Form 1 for the draft Notice to Defendant. This proposed provision is analogous to Rule 5(a)(5) and Rule 13(a)(1) of the Rules of Procedure for Eviction Actions, which provide as follows:

> 5(a): The summons shall also include the following:
>
> 5) In residential property actions only, on a separate page served upon the tenant, the information contained in the Residential Eviction Procedures Information Sheet substantially in the form included as Appendix A to these Rules.
>
> 13(a): **a. Items to Review.** Except for stipulated judgments entered pursuant to Rule 13(b)(4), in each eviction action the court shall:
>
> (1) Determine whether the service of the summons and complaint was proper and timely, and whether the summons and complaint included all the information and notice(s) required under Rule 5.

6. Rule 115: Service of the summons and complaint

- New language was added by staff concerning a proof of service on an out-of-state individual:

> ***f. Service on an out-of-state individual.*** Except as provided in paragraph (g), an out-of-state individual may be personally served by someone who is authorized to serve process under the laws of the state where service is made on the defendant. The person who completed service shall prepare an affidavit as proof that a defendant was served, and the proof of service shall be filed with the court. If the defendant lives outside Arizona, service may, in the alternative, be made by certified mail, with a return receipt showing restricted delivery to the defendant. The return receipt with defendant's signature shall be filed with the court with an affidavit of service as provided by Rule 4.2(c) of the

Arizona Rules of Civil Procedure. Service by certified mail is complete on the date that defendant signed the receipt, as shown on the return receipt, and if there is no date of defendant's signature on the return receipt, or if the date is not legible, then service is complete on the date that the return receipt is filed with the court.

- The following sentence was also added by staff to paragraph (g) concerning "special situations for service of the summons and complaint on a defendant outside the State of Arizona:

  Proof of service upon any of the above defendants or using one of the above methods shall be prepared by the person who completed service, and the proof of service shall be filed with the court, except that proof of service under the Nonresident Motorist Act shall be made as provided by Rule 4.2(e), and proof of service by publication shall be filed as provided by Rule 4.2(f).

7. Rule 117: Time calculations

As shown below, staff made the following revisions:

- Topic headings were added to paragraph (a)

- Clarifying language was added to paragraph (b)

  a. Basic rules. ~~Time is calculated in these rules as follows:~~

  1. Day of the act or default. In calculating any period of time specified or allowed by these rules, by any local rules, by order of a court, or by any applicable statute, the day of the act or default from which the designated period of time begins to run shall not be included.

  2. If the time period is less than eleven days. When the period of time specified or allowed is less than eleven days before including any additional time allowed under paragraph (b) of this rule for mailing or e-mailing, then intermediate Saturdays, Sundays and legal holidays shall not be included in the calculation of time. When the period of time is eleven days or more, intermediate Saturdays, Sundays and legal holidays shall be included in the calculation.

  3. Last day. The last day of the period shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

  b. Additional time for mailing or e-mailing. Whenever a party has the right or is required to do something within a specified period after service of a notice or ~~other paper~~ document upon the party, other than a complaint or a third party complaint, and the notice or paper is served by first class postal mail or by e-mail, five calendar days are

added after the prescribed period would otherwise expire under Rule 117a. This rule does not apply to the distribution of a notice of entry of judgment as provided in Rule 139f.

8. Rule 119: Counterclaims and cross-claims

Staff changed "transaction or occurrence (event)" to "transaction, occurrence, or event" in paragraphs (a), (b), and (d).

9. Rule 122: Service of documents on other parties after the summons and complaint

The draft minutes of the July 20 meeting contain the following "action item":

> **Rule 122c: Methods of providing a document to other parties.** The draft rule specified five methods of providing service. To the method allowing service by first class mailing, the members added "or by using a commercial courier who produces a written confirmation of delivery."
>
> **Action item:** The language concerning a commercial courier should be clarified at the next meeting: does service by a commercial courier constitute "delivery", or is it service by "mailing" that requires the addition of five days to the response time?

10. Rule 123: Duty of all parties to promptly disclose ~~information~~ facts about the lawsuit.

- Staff changed the title of the rule as shown above.

- The text in paragraph (a), that "the duty to disclose is an affirmative duty" was deleted because the "affirmative duty" may be considered undefined legal jargon, and because the concept is stated in the paragraph with layman's language as: "The disclosure statement must be given to the other parties even without another party asking that disclosure be provided."

- Staff changed the title of paragraph b from "items to disclose" to "disclosure of information." This change provides symmetry with paragraph (c), which is entitled "disclosure of documents." Also, in paragraph (h), the words "or documents" was added by staff to provide a sanction for failing to timely disclose "information or documents", i.e., failure to make disclosure under paragraphs (b) or (c).

- Ms. Blanco suggested deleting the following provision, noting that Judge McMurry feels that the discovery of witness is sufficient for JP court:

  (b)(4) The name, address, and telephone number of each person that the disclosing party expects to call as an expert witness at trial, if any, the qualifications of the expert, the subject matter on which the expert is expected to testify, the opinions and conclusions of the expert, and a summary of the facts upon which the expert relies to support those opinions and conclusions.

11. Rule 124: General provisions regarding discovery

Staff revised paragraph (c) as follows:

> ***c. Timing of discovery.*** Methods of discovery may be used in any sequence unless otherwise ordered by the court. A party may file a motion requesting the court to enter an order concerning the sequence of discovery ~~on the basis that~~ by explaining how it would be for the benefit or convenience of parties or witnesses, or ~~that~~ why it would be in the interests of justice.

Mr. Jones would like further consideration given to Nevada's Justice Court Rule 25A, which is in the meeting materials, and that would require a court order to obtain discovery for cases in which there is a self-represented litigant.

12. Rule 125: Depositions

Ms. Fabian proposed a requirement that a defendant could be deposed only in the county in which the defendant resides.

13. Rule 128: Requests for admissions

On the "grace period" notice in paragraph (c), staff added the words "and signature" after the date.

14. Rule 130: Motions

Staff revised paragraph (e) as follows:

> ***e. Proceedings on a motion.*** Any party opposing a motion ~~may~~ shall have ten days after the motion is served, as calculated under Rule 117, ~~for filing~~ to file a response to the motion with the court and for serving the response upon the other parties. The court may treat a party's failure to file a response to a motion as the party's consent that the motion be granted. Within five days ~~thereafter~~, as calculated under Rule 117, after a response is filed, the moving party may file with the court and serve upon the other parties a reply to ~~any~~ the response, but a reply shall not be required. ~~The court may treat a party's failure to file a response to a motion as the party's consent that the motion be granted.~~

Ms. Fabian suggested that deadlines should be extended to fifteen calendar days for a response and ten calendar days for a reply.

15. Rule 131: Pretrial conferences

Staff made a change to the title of existing paragraph (b) to more accurately reflect the substance of the provision. Also, the duty to advise the court at the pretrial about exhibits was deleted

because the parties are now obligated to exchange documents by the pretrial date. The draft paragraph now reads:

> ***b. Duty to exchange documents; ~~T~~trial date ~~coordination~~***. ~~At the pre-trial conference, the parties should be prepared to advise the court which exhibits and what witnesses they will use~~ call ~~at trial, and how much time they expect they will need for presenting their case~~. The parties must bring to the pretrial conference, or exchange before the conference, reasonably available documents that provide a basis for the underlying claim or defense; but for good reasons, the court may grant a party an additional fourteen days to provide those documents. The parties should also be prepared at the pretrial conference to discuss a trial date. At the pre-trial conference, the parties should be prepared to advise the court ~~which exhibits and~~ what witnesses they will ~~use~~ call at trial, and how much time they expect they will need for presenting their case.

Ms. Blanco proposed adding this new provision:

> ***b. Procedure***. The Pretrial Conference will be set by the Court 60 days or more from Defendant's answer as the court's calendar allows. The Parties will be notified of the Pretrial Conference date by mail.

16. Rule 132: Setting a lawsuit for trial

Paragraph (b) was revised as follows:

> ***b. ~~Request~~ Motion to postpone a trial date.*** After a trial has been scheduled for a specified date, the court will grant a motion for postponement of the trial date only if there are good reasons, or if the parties agree to a postponement. The failure of the plaintiff to appear at the time set for trial may result in dismissal of the lawsuit, and the failure of a defendant to appear may result in judgment for the plaintiff.

Note that the added sentence was taken from Rule 134(a) of the prior draft; staff believes that it is more appropriately located in Rule 132.

Ms. Blanco suggested that a motion to postpone the trial must be filed at least twenty days prior to the trial date in order to allow a response from the opposing party. If the motion was filed less than twenty days before the trial date, she proposed that the court would rule on the motion ex-parte.

17. Rule 134: Trial by jury or to the court, etc.

Regarding paragraph (f) – "verdict or decision" – Ms. Blanco suggested adding a provision that "the matter may be taken under advisement for not more than sixty days."

18. Rule 138: Witnesses

Staff made the following revisions:

> ***a. General rule.*** A witness is a person who provides sworn testimony during a lawsuit. A witness may be sworn with a solemn affirmation rather than an oath. The testimony of a witness at trial shall be presented in person or by deposition. The admissibility of a witness' testimony shall be determined by the Arizona Rules of Evidence. ~~A witness may be sworn with a solemn affirmation rather than an oath.~~

19. Rule 139: Judgment

Ms. Blanco proposed adding a requirement that the party that submits a form of judgment also include a self-addressed stamped envelope for each party who has appeared in the action. She also suggested that the court have sixty days in which to sign the judgment.

Ms. Fabian proposed adding this language: "If a party's request for fees is based on language in a contract, that contract must be attached to the fee request."

20. Rule 140: Entry of default; default judgment

Staff made the following revisions to a sentence in paragraph (b): "The motion must include ~~an~~ a supporting affidavit of the party who files the motion as well as exhibits that ~~support~~ prove the amount of the claim."

See also a "note" in paragraph (b) concerning the compatibility of the provisions in this rule concerning attorneys' fees.

See also *Neeme v Spectrum*, provided in the meeting materials. A petition for review was filed in this case on April 25, 2011. The petition is pending in the Arizona Supreme Court.

21. Rule 141: Summary judgment

The Chair proposed adding the following provision to paragraph (b) of this draft rule:

> The failure of a party who does not have the burden of proof on a claim or defense to file a response to a motion is not a sufficient basis for granting a summary judgment motion.

Ms. Blanco proposed that a summary judgment motion against a self-represented defendant require an advice that if the defendant fails to respond to the motion, a judgment may be entered without a trial or other hearing. In support of this proposal, Ms. Blanco cited *Timms v. Frank* 953 F.2d 281 (7th Circ., Ill.), 1992, which states in part:

> "…we believe that all *pro se* litigants, not just prisoners, are entitled to notice of the consequences of failing to respond to a summary judgment motion. As outlined in *Lewis,* this notice should include both the text of Rule 56(e) and a short and plain statement in ordinary English that any factual assertion in the movant's affidavits will be taken as true

by the district court unless the non-movant contradicts the movant with counter-affidavits or other documentary evidence. *See Lewis,* 689 F.2d at 102. Counsel should include this notice with the summary judgment motion, but if they fail to do so this responsibility will fall on the district court. *See id.* at 102-03. We base this decision on the rationale of *Lewis* and a belief that the attempted distinction between prisoners and other *pro se* litigants with regard to this issue is unconvincing.

"Lewis required notice of Rule 56(e)'s requirements because the need to answer a summary judgment motion with counter-affidavits is "contrary to lay intuition." 689 F.2d at 102.

> 'It would not be realistic to impute to a prison inmate (unless, like the 'former law professor' of whom this court spoke in *Maclin v. Freake,* 650 F.2d 885, 888 (7th Cir.1981) (per curiam), the prisoner has legal training) an instinctual awareness that the purpose of a motion for summary judgment is to head off a full-scale trial by conducting a trial in miniature, on affidavits, so that not submitting counter affidavits is the equivalent of not presenting any evidence at trial.' "

For a contrary view, see *MacLeod v. Georgetown University Medical Center* 736 A.2d 977 (D.C.,1999).

> "… interference by the court in civil litigation "necessarily implicates the court's impartiality and discriminates against opposing parties who do have counsel." *Jacobsen, supra,* 790 F.2d at 1365 n. 7. As *McNeil* reiterates, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." 508 U.S. at 113, 113 S.Ct. 1980 (quoting *Mohasco Corp. v. Silver,* 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980)). Additionally, "even if a substantive notice requirement were desirable, it should be enacted through formal amendment rather than piecemeal adjudication. Rule 56's separate notice provision (compare Rule 56(c) with Rule 6(d)) and description of summary judgment (compare Rule 56(e) with Rule 12(b)) indicate that the Supreme Court and its Advisory Committee have considered the special problems raised by the summary judgment procedure and ... concluded that the present federal rules ... already apprise litigants of their summary judgment obligations." *Jacobsen, supra,* 790 F.2d at 1366.
>
> "A requirement of active trial court assistance has an open-ended quality to it. As *Jacobsen* points out, if the trial court should have told the *pro se* litigant of the need to file affidavits, then the next step would be that the court must explain what an affidavit is, which in turn impels a rudimentary outline of the rules of evidence, and so forth. "To give that advice would entail the district court's becoming a player in the adversary process rather than remaining its referee." *Id.* at 1366."

22. Rule 145: Dismissal of lawsuits

The following changes were made:

> ***c. Voluntary dismissal by agreement of the parties.*** A lawsuit, or any claims made in a lawsuit, may be dismissed ~~by a court order~~ upon submission of a written agreement to dismiss that has been signed by all of the parties who have appeared in the lawsuit.
>
> ***d. ~~Voluntary d~~ Dismissal in other circumstances.*** Except as provided in paragraphs (b) and (c), a lawsuit or claim shall be dismissed only upon motion and by court order, and only on terms and conditions that the court determines are fair and proper. Dismissal of a complaint will not result in a dismissal of a counterclaim unless agreed to by the parties.

23. Rules 149 and 150 (Tables and Forms)

The order of these rules was reversed by staff. Rule 149 is now Forms, and Rule 150 is Tables.

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